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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-638

JAMES L. TRAINOR, Director, Illinois Department of Public Aid,

Petitioner,

vs.

SYLVIA WILSON, individually and on behalf of her unborn child, and on behalf of all others similarly situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES L. TRAINOR, Director, Illinois Department of Public Aid, respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on July 31, 1975.

OPINION BELOW

The order of the Circuit Court is unpublished, and is included herein as Appendix C.

JURISDICTION

The order of the Seventh Circuit vacating and denying costs to petitioner was entered July 31, 1975. Petition for rehearing en banc was denied on September 10, 1975.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1) and § 2106.

QUESTION PRESENTED

Whether costs previously awarded to prevailing party on appeal may thereafter be summarily vacated and denied without findings or a statement of reasons for the reversal, and without an adequate and sufficient reason existing at law.

STATUTES INVOLVED

Rule 39, Federal Rules of Appellate Procedure:

> "(a) *To whom allowed.* Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise

ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court."

Title 28 U.S.C. § 1915(e):

"Proceedings in forma pauperis

• • •

(e) Judgement may be rendered for costs at the conclusion of the suit as in other cases. . . ."

STATEMENT OF THE CASE

On March 31, 1975, the Supreme Court granted petitioner's original petition for Certiorari, vacated judgment and remanded to the Seventh Circuit. (420 U.S. 999, 95 S. Ct. 1440) On July 11, 1975, the Seventh Circuit allowed costs in favor of petitioner (unpublished per curiam order included herein as Appendix A) and remanded to the District Court. (519 F. 2d 1406)

On July 21, 1975, respondent filed a motion to vacate the judgment with respect to costs. (included herein as Appendix B) Petitioner filed detailed written objections to the motion.

On July 31, 1975, Circuit Judge Luther M. Swygert entered a minute order striking that portion of the order of July 11, 1975 awarding costs to petitioner, and summarily denying costs. (unpublished order included herein as Exhibit C)

Petitioner filed a motion to vacate the order of July 31, 1975 and for review by the entire court, renewing and setting forth in greater detail his previous objections. (included herein as Exhibit D) This motion was summarily denied on September 10, 1975. (included herein as Exhibit E)

This is an appeal from the order of the Seventh Circuit summarily vacating and denying costs previously awarded to the prevailing party on apepal, without findings or a statement of reasons for the reversal and without an adequate or sufficient reason existing at law.

REASONS FOR GRANTING THE WRIT

I.

THE ORDER OF THE SEVENTH CIRCUIT IS IN CONFLICT WITH ITS OWN ESTABLISHED PRACTICE.

On remand from the Supreme Court, the Seventh Circuit ordered that costs be taxed in favor of petitioner herein. (Appendix A)

This was proper and in accord with Rule 39 F.R.A.P. as the position originally urged by petitioner in the District Court (358 F. Supp. 1147) had prevailed in the Supreme Court (420 U.S. ——, 95 S. Ct. 1180) despite prolonged and unrelenting opposition and procedural obstructions interposed by respondent throughout every phase of the appeal: e.g., opposition to Stay pending appeal, Brief, filed June 27, 1973 and Motion for Reconsideration, filed July 19, 1973; opposition to Recall and Stay pending appeal, Motion filed May 23, 1974 and Response filed June 3, 1974; opposition to Stay of Judgment pending review on Certiorari, Memo filed June 17, 1974, and Motion to Full Court to Vacate Stay, filed June 21, 1974, docketed in the Supreme Court under A-1212; opposition to Remand to the District Court, Motion filed May 5, 1975.

The question of disallowing costs to the prevailing party was most recently decided by the Seventh Circuit in *Popeil Brothers, Inc.* v. *Schick Electric, Inc.*, 516 F. 2d 772 (CA 7, 1975). The court initially noted that:

> "The most significant issue presented by this appeal is whether the district court abused its discretion under Rule 54(d) of the Federal Rules of Civil Procedure by setting aside the taxing of costs in favor of the prevailing party. . . ." (p. 773)

The language of Rule 54(d) F.R.C.P. is almost identical to Rule 39(a) F.R.A.P.

In reviewing the history of award of costs, the court observed that:

> "Prior to the promulgation of the Federal Rules of Civil Procedure, there was a 'rule of practice established by long usage' that in actions at law the prevailing party was entitled to costs as of right. Ex parte Peterson, 253 U.S. 300, 317-18, 40 S. Ct. 543, 64 L. Ed. 919 (1920)." (p. 774)

The court then summarized the current practice followed by the Seventh Circuit:

> "Consequently, the language of the rule reasonably bears the intendment that the prevailing party is prima facie entitled to costs and it is incumbent on the losing party to overcome the presumption. Lichter Foundation, Inc. v. Welch, 269 F. 2d 142, 146 (6th Cir. 1959).
>
> This circuit has through the years adhered to this interpretation and has reversed exercises of discretion which go beyond it. Jones v. Schellenberger, 225 F. 2d 784, 794 (7th Cir. 1955), cert. denied, 350 U.S. 989, 76 S. Ct. 476, 100 L. Ed. 855 (1956) ("reprehensible" conduct by the prevailing party triggered the "fullest extent" of discretion against him); Chicago Sugar Co. v. American Sugar Refining Co., 176 F. 2d 1, 11 (7th Cir. 1949), cert. denied, 338 U.S. 948, 70 S. Ct. 486, 94 L. Ed. 584 (1950); United States v. E. J. Biggs Const. Co., 116 F. 2d 768, 775 (7th Cir. 1940). (p. 775)
>
> • • •
>
> The mere fact that the unsuccessful party was an ordinary party acting in good faith and neither harassing its opponent nor abusing legal process is not sufficient to overcome the presumption that the prevailing party is entitled to costs. There exists another presumption, and that is that parties on both sides of a cause are acting honestly and ethically. That the losing party is in fact what he is presumed to be and is in fact conducting himself as he is expected and required to conduct himself, does not create any equities defeat-

ing the presumption that the prevailing party collect the costs due to him 'as of course.' If the awarding of costs could be thwarted every time the unsuccessful party is a normal, average party and not a knave, Rule 54(d) would have little substance remaining.

Nevertheless, the losing party relies upon the *Chicago Sugar Co.* language to the effect that the court may in its discretion require each party to bear its own costs where 'the action was brought in good faith, involving issues as to which the law is in doubt.' *Chicago Sugar Co., supra* at 11. These words were at war with the theory of prevailing-party-default expressed in the remainder of the opinion, relied only upon a 1909 district court opinion, and were immaterial to the result. Inasmuch as virtually every case brought in good faith in some respect involves issues as to which the law is in doubt, if only in regard to the ultimate outcome, a literal interpretation of the language would render Rule 54(d) meaningless.

• • •

We conclude that the district court abused its discretion in setting aside the taxing of costs by the clerk of the district court (p. 776) . . . The original judgment could have expressly denied costs, whereupon the parties could have briefed and argued that issue and had it determined in the first appeal. However, the original judgment was silent and the presumption was not taken away. We therefore vacate the order granting the motion to set aside and remand with directions to reinstate the costs so awarded in the amount of $13,674.35."

Notwithstanding, the Seventh Circuit's well established and clearly expressed practice with respect to awarding costs to a prevailing party, Judge Swygert without explanation, or justification for a contrary exercise of discretion, granted respondent's motion to set aside costs. (Appendix B) and arbitrarily denied costs to petitioner. (Appendix A, E). This was error and the order of July 31, 1975 should be set aside.

II.

THE ORDER OF THE SEVENTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THE SUPREME COURT AND OTHER CIRCUITS.

The Circuit Court orders of July 31, 1975 (Appendix C) and September 10, 1975 (Appendix E) do not acknowledge or discuss any of the matters set forth in detail in petitioner's objections to the motion to vacate costs (Appendix D), and the Circuit Court has not at any time made findings to justify overruling the objections and to support entry of its orders vacating and denying costs to petitioner.

In *TransWorld Airlines, Inc.* v. *Hughes*, 515 F. 2d 173 (CA 2, 1975) the Second Circuit rejected as a sufficient recited reason "the court's wise exercise of its discretion" to disallow certain costs when a judgment is reversed (p. 117) saying:

> "While, to be sure, costs are allowable in the exercise of the district court's discretion, that discretion must not be exercised arbitrarily: 'Discretion without a criterion for its exercise is authorization of arbitrariness.' Brown v. Allen, 344 U.S. 443, 496, 73 S. Ct. 397, 441, 97 L. Ed. 469 (1953). The district court sets forth no criterion for the disallowance of this item of costs." (p. 178)

In *Northcross* v. *Board of Education*, 412 U.S. 427, 93 S. Ct. 2201 (1973), the Supreme Court had occasion to consider a situation identical to the case at bar. The Circuit Court had denied costs to the prevailing party without stating reasons for the denial. In a per curiam opinion granting petition for certiorari, and vacating the judgment below insofar as it related to the denial of costs, the court said:

> "In this case, the United States Court of Appeals for the Sixth Circuit denied petitioners' motion for an award of costs and attorneys' fees. The Court of Ap-

peals did not, however, state reasons for the denial and it is therefore not possible for this Court to determine whether the Court of Appeals applied the proper standard in reaching this result."

Similarly, in *Taylor* v. *McKeithen*, 407 U.S. 191, 92 S. Ct. 1980 (1972), the Supreme Court granted certiorari, vacated judgment and remanded to the Circuit Court specifically for an explication of the reasoning of the lower court to support its judgment.

See also *N.L.R.B.* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 442-443, 85 S. Ct. 1061, 1064 (1965); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167, 83 S. Ct. 239, 245 (1962); *Kelley* v. *Everglades Drainage Dist.*, 319 U.S. 415, 422, 63 S. Ct. 1141, 1145 (1943).

In the case at bar, it is impossible to determine why Judge Swygert departed from established practice and vacated and denied costs to the petitioner, and the justification for this order, if any exists, will remain a mystery unless certiorari is granted.

III.

NO ADEQUATE OR SUFFICIENT REASON EXISTS TO JUSTIFY DENIAL OF COSTS TO PETITIONER.

Respondent suggested three reasons for vacating and denying costs to petitioner, who was the prevailing party on appeal to the Supreme Court (420 U.S. 999, 95 S. Ct. 1440): (A) Plaintiff and the members of the plaintiff class were paupers; (B) plaintiff had originally prevailed in the Seventh Circuit; and (C) on remandment to the District Court, it is unclear who will ultimately prevail. (Appendix B)

Although the Circuit Court did not disclose which of these unsupported suggestions by respondent motivated the order of July 31, 1975 (Appendix C), upon close examination, none of them is adequate or sufficient as a matter of law.

A.

An unsuccessful litigant, whether proceeding in forma pauperis or not, is liable for costs unless good cause exists to order otherwise. Title 28 U.S.C. § 1915(e). Cf. *Duhart* v. *Carlson,* 469 F. 2d 471, 478 (CA 10, 1972), cert. den. 410 U.S. 958, 93 S. Ct. 1431 (1973); *Perkins* v. *Cingliano,* 296 F. 2d 567, 568 (CA 4, 1961).

Moreover, petitioner expressly informed the Court that he was not seeking to recover costs from a pauper. (Appendix D, para. 6, p. D3) Although suit is nominally brought by Sylvia Wilson, in fact, the suit has been maintained as a class action, developed, financed, prosecuted and controlled by the Legal Assistance Foundation of Chicago and East Garfield Legal Services, and the allowable costs are to be paid by that non-prevailing party.

The Legal Assistance Foundation, and its constituent offices, have heretofore, in other litigation, aggressively sought and received substantial costs and attorneys fees from petitioner payable directly to the Foundation as attorney.

For example, on or about March 21, 1975 in *Rodriguez* v. *Trainor,* 69 C 2615, Sheldon Roodman [also attorney for respondent herein] by petition on behalf of the Legal Aid Foundation, attorney for plaintiffs, was awarded $16,925 incurred, inter alia, for court appearances and preparation work in opposition to defendants' Motion for Stay of the Court's order, and motions, briefs and oral argument on appeal before the Seventh Circuit Court of Appeals, and preparation of Brief in Opposition to Petition for Writ of Certiorari before the United States Supreme Court. (See Roodman Affidavit, and Memorandum Opinion included herein in Appendix D, p. D6-16)

On August 12, 1974, petitioner was ordered to pay $1,200 "to the attorney for the plaintiffs, Sheldon Roodman, on behalf of the Legal Assistance Foundation of Chicago."

On November 8, 1973, in *Jeffries* v. *Weaver*, 70 C 3196, petitioner was ordered to pay $225 to the Edwin F. Mandel Legal Aid Clinic.

Judge Swygert, himself, on December 10, 1973, in *United States* v. *Board of School Commissioners of Indianapolis*, No. 72-1948, entered an order of payment of fees directly to the Legal Services Organization. (Appendix D, p. D17) See also, e.g., orders entered February 11, 1975 in *Weisenberger* v. *Huecker*, No. 7299, and on February 19, 1975, in *Milburn* v. *Huecker*, No. 7301B. (Appendix D, p. D18-20)

On information and belief, the Legal Aid Foundation has been allowed costs against petitioner and his predecessors in every case where they as attorneys for plaintiffs have prevailed on the merits.

However, by the July 31, 1975 order of the Seventh Circuit, the Legal Aid Foundation is permitted to evade payment of costs in a case where it is petitioner who has prevailed on the merits, even though those costs may be drawn from the identical fund created by costs heretofore payed by petitioner to the Legal Aid Foundation in other cases.

No reason for such disparity in application of the costs rule has been advanced by either respondent or the court. (Appendix C, E)

It is palpably inequitable and a denial of equal protection to make the Legal Aid Foundation the beneficiary of costs at the expense of petitioner, but deny reciprocal obligation to repay costs when the roles have been reversed because the nominal plaintiff is a pauper, and the controlling role of the Legal Aid Foundation is unrecognized.

B.

The contention that costs should be denied because respondent had originally prevailed before the court which was reversed cannot be seriously intended.

In the first place, it should be noted, that the Seventh Circuit was in fact divided, with a compelling dissent. (499 F. 2d 155, 158) If the respondent had not prevailed in the lower court and had that court not been in error, no appeal and no reversal would have followed, and petitioner would not now be seeking to recover his costs which were necessary to vindicate the rights of the People of the State. It should also be noted that the Supreme Court did in fact ultimately affirm the very position urged by petitioner in both the district court and circuit court.

The time and effort required of petitioner to perfect these rights were not insignificant. In addition to the work required to overcome the obstacles detailed at page 5, supra, the docket fee and cost of printing petitioner's briefs in the Seventh Circuit Court of Appeals was $657.85, as originally ordered by the court. (Appendix A)

The docket fee and cost of printing petitioner's original Petition for Writ of Certiorari in the United States Supreme Court was $832.40, which costs were not recoverable pursuant to Supreme Court Rule 57(3).

By the capricious logic of respondent, petitioner should be denied all costs because he was the appellant and prevailed. Thus, the effect, if not the intent, of the order of July 31, 1975, is to oppress and penalize petitioner for succeeding in reversing the Circuit Court, and thus to chill and inhibit dedicated and effective defense in public policy cases.

C.

The respondent is disingenuous in suggesting that costs should not be awarded to petitioner because it is unclear who the ultimate prevailing party will be.

As provided by rule, petitioner was awarded costs for prevailing on all the issues which were the subject of his appeal. That portion of the case has been completed. On those issues, there is positively no uncertainty as to the prevailing party.

Respondent did not originally suggest that award of costs merely be deferred until completion of the entire case, and the Circuit Court did not so rule. By the July 31, 1975 order of Judge Swygert, petitioner can never recover his appellate costs, regardless of his ultimate success on every remaining issue in the case.

Rule 39(c) F.R.A.P. expressly requires that a party desiring appellate costs to be taxed must do so within 14 days after entry of judgment, and subsection (d) requires those costs to be inserted in the mandate. This was done in the case at bar, until Judge Swygert's inexplicable order.

Thus, respondent has raised no adequate or sufficient reason to support vacating and denying costs to petitioner, and the circuit court has suggested no other findings or reasons to justify its arbitrary, discriminatory and capricious order.

CONCLUSION

Petitioner was the prevailing party on appeal and was awarded costs pursuant to Rule 39 F.R.A.P.

After remand, on an unsupported motion of respondent, Judge Swygert of the Seventh Circuit vacated the portion

of the judgment order awarding costs and summarily denied costs to the petitioner.

The Circuit Court failed to make findings or to assign reasons for its order vacating and denying costs to petitioner.

The respondent failed to suggest adequate or sufficient reasons to justify vacating and denying costs to petitioner.

Neither respondent nor the Circuit Court cited relevant statute, rule or reported case to support the vacating and denial of costs to petitioner.

The order of the Seventh Circuit is in conflict with its own established practice and with decisions of the Supreme Court and other circuits.

The question of equal application of the rule on costs and abuse of discretion is one of fundamental importance in the impartial administration of justice, in this case and all others of like nature, and a definitive ruling is essential to insure justice to petitioner and uniformity of decisions to all.

WHEREFORE petitioner prays that a Writ of Certiorari be granted to review the July 31, 1975 order of the Seventh Circuit Court of Appeal which vacated and denied costs to the petitioner, and that the order of July 31, 1975 be reversed.

Respectfully submitted,

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Respondent.

CERTIFICATE OF SERVICE

I, Herbert Lee Caplan, Assistant Attorney General, a member of the Bar of the Supreme Court of the United States, and counsel for the Petitioner, hereby certify that I have this 28th day of October, 1975, served three copies of the foregoing Petition for Writ of Certiorari upon Lorelei Borland, Garfield-Austin Legal Services, 4 N. Cicero, Chicago, Ill. 60644; Sheldon Roodman, 64 E. Jackson Blvd., 6th Floor, Chicago, Ill. 60604; Bernard Carey, State's Attorney of Cook County, 500 Civic Center, Chicago, Ill. 60602 and Samuel K. Skinner, Acting U.S. Attorney, 219 S. Dearborn, Chicago, Ill. 60604, by depositing same, first class postage prepaid, in the United States mail chute at 160 North LaSalle, Chicago, Illinois. All parties required to be served have been served.

HERBERT LEE CAPLAN